Supreme Court, U.S.
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No. 01-1028

In The

Supreme Court of the United States

CITY OF SAN ANTONIO and
TEXAS TOWING CORPORATION,

Petitioners,

v.

BRENDA L. STUCKY, d/b/a Bill's Wrecker Service, and RICHARD VILLANEVA, d/b/a Creswell's 24 Hour Wrecker Service,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

JONATHAN E. BRUCE
Counsel of Record
LIVINGSTON & ASSOCIATES P.C.
6464 Savoy, Suite 100
Houston, Texas 77036
(713) 667-2234

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF PARTIES

The only parties to this proceeding are listed in the caption. Pursuant to Supreme Court Rule 29.1, the Court is advised that Respondents have no parent companies or subsidiaries that are not wholly owned.

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BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari in this case. The Petitioners' preemption and related delegation issues are currently before the Court. The remainder of the petition presents no legal issues of general importance beyond the facts of this particular case or that otherwise would merit the Court's plenary review.

BACKGROUND

Respondents, Brenda L. Stucky, d/b/a Bill's Wrecker Service, and Richard Villaneva, d/b/a Creswell's 24 Hour Wrecker Service, are tow truck operators whose principal places of business are located within the municipal boundaries of the City of San Antonio.

The City of San Antonio through City Code § 19-391(a) and related enabling ordinance(s) has enacted a single vendor contract towing system for the towing of any vehicle involved in a collision on a public street.[1]

[1] San Antonio City Code, § 19-391(a):

(a) It shall be unlawful for any person, in the operation of an automobile wrecker on the public streets and ways of the city and not having been directed to do so by the chief of police, the parking manager of the public works department or authorized representatives, knowingly to move, tow, haul or otherwise transport in, on or over the public streets and ways of the city any vehicle which has been abandoned or which has been involved in

Under this system only the City's contracted towing service, currently Petitioner Texas Towing Corporation, is allowed to tow a vehicle from a collision scene. No consideration is given by the City to the desires of the disabled vehicle operator at the scene of the collision. "[A] person involved in a collision is not permitted to call the towing service of his choice but must, despite his protest, engage the services of the wrecker service with whom the City (San Antonio) has a current contract." *Andrada v. City of San Antonio*, 555 S.W. 2d 488, 490 (Tex.Civ.App.– San Antonio 1977, *writ dism'd*). Disabled vehicle operators are prohibited from employing a tow truck service that may offer a better rate or a towing service through their enrollment in a motor club, the American Automobile Association, or a dealership service contract. Violation of City Code § 19-391(a) can result in criminal penalty and termination of the violator's City issued motor vehicle tow service license.[2] The effect of the single vendor contract system is an absolute bar to Respondents, and any towing tow truck operator, other

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collision and is on a public street, way or other public property.

The current "Wrecker Service Contract" with petitioner Texas Towing Corporation was adopted under City Ordinance No. 87775. (City Ordinance No. 77716, at the time of the filing of the Plaintiffs' Original Complaint).

[2] Sec. 19-392. Penalties for violations.

Conviction of any provision of this chapter shall be punished in accordance with section 1-5. Said criminal penalties shall be cumulative of any other rights held by the city on behalf of the public; namely, the power to terminate a motor vehicle tow service license.

than the contract towing service, from participation in the collision towing market in San Antonio, Texas.

Respondents asserted in the lower courts that the City's single vendor contract system, to the extent it regulates those collision instances where the disabled vehicle operator was present at the scene and willing and able to select a towing service, (defined by Respondents as a "consent tow"), was preempted by the Federal Aviation Administration Authorization Act of 1994, now codified as 49 U.S.C. § 14501(c)(1). Respondents concede in those instances where the vehicle operator/owner is not present or able to select a towing service, due to injury or arrest, or the vehicle is abandoned, illegally parked, or taken into police custody, (defined by Respondents as a "nonconsent tow"), the City's single vendor contract system is not subject to preemption, under the municipal-proprietor/market-participant doctrine.

In response, Petitioners, both in the lower courts and in their petition, raise two issues. First, the single vendor contract system having been enacted for safety reasons, falls within the safety exception to preemption of 49 U.S.C. § 14501(c)(2)(A). Second, the City's actions, contracting for towing services, are proprietary in nature, regardless of whether the tow is consensual or nonconsensual, thus not subject to preemption, pursuant to the municipal-proprietor/market-participant doctrine.

The Fifth Circuit, based upon the general language of 49 U.S.C. § 14501(c)(1), and its legislative history, reject Petitioners' claim of safety authority under section (c)(2)(A), with respect to consensual towing from a collision. *Stucky v. City of San Antonio*, 260 F.3d 424, 439-446

(5th Cir.), *reh'g denied*, 266 F.3d 342 (5th Cir. 2001). The *Stucky* court also rejected Petitioners' claim that its single vendor towing system, as applied to collision consensual towing was propriety in nature. *Id.* at 434-439. With this backdrop Petitioners seek certiorari.

REASONS FOR DENYING THE WRIT

I. THE ISSUE OF THE STATE'S AUTHORITY TO DELEGATE ITS SAFETY TO POLITICAL SUBDIVISION IS CURRENTLY BEFORE THE COURT.

The issue raised by Petitioners in their first question presented and corresponding argument, whether the Federal Aviation Administrative Authorization Act, 49 U.S.C. § 14501(c)(1), preempts a state from delegating its safety authority contained in 49 U.S.C. § 14501(c)(2)(A) to municipalities, is currently before this Court in *City of Columbus v. Ours Garage & Wrecker Service*, 257 F.3d 506 (6th Cir. 2001), *petition for cert. granted*, U.S. No. 01-419. While the challenged municipal tow truck regulatory schemes differ factually, in the case at hand, respondent tow truck operators challenged the City of San Antonio's use of a single vender towing contract regulating all consensual towing from the scene of a vehicle collision. In *Ours Garage*, the respondent tow truck operators challenged the City of Columbus's general tow truck licensing code provisions, the fundamental disputed legal issue is the same – the state's authority to delegate its safety authority provided in 49 U.S.C. § 14501(c)(2)(A), in light of § 14501(c)'s general preemptive language. As this issue

will be resolved by this Court in the *Ours Garage* case, certiorari in this case on this point is not warranted.

II. THE REMAINING ISSUES IN THIS CASE, APPLICATION OF THE MUNICIPAL-PROPRIETOR/MARKET-PARTICIPANT DOCTRINE, AND THE CONSENT-NONCONSENT DISTINCTION, ARE NOT WORTHY OF REVIEW.

A. The Petitioners' Claim That The *Stucky* Decision Is Inconsistent With *Boston Harbor* Is No More Than A Dispute As To The Facts Applied.

The Petitioners' complaint, that the Fifth Circuit in *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), reached the wrong conclusion based on this Court's holding in *Building and Construction Trades Council v. Associate Builders and Contractors of Massachusetts/ Rhode Island, Inc.*, 507 U.S. 218 (1993) (*"Boston Harbor"*), is nothing more than a request to correct perceived error and is not worthy of review by this Court. Petitioners do not contend that the *Stucky* decision directly conflicts with or abrogates the two-apart analysis set forth in *Boston Harbor*. Nor, do Petitioners cite any case in direct conflict with the holding in *Stucky*. In fact, every circuit court that has addressed the issue of preemption under 49 U.S.C. § 14501(c)(1), as applied to city nonconsensual towing, have all reached the same conclusion, nonconsensual towing is exempted from preemption pursuant to the municipal-proprietor/market-participant doctrine. *See, e.g., Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 691-95 (5th Cir. 1999), relying on *Boston Harbor; Petrey v. City of Toledo*, 246 F.3d 548, 555-59 (6th Cir. 2001), citing *Cardinal Towing; Tocher v. City of Santa*

Ana, 219 F.3d 1040, 1048-50 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001), also citing *Cardinal Towing*. Instead, Petitioners assert that the Fifth Circuit reliance on which party, the disabled vehicle driver or the city, was the consumer of the towing service was incorrect under *Boston Harbor*.

In *Cardinal Towing*, relying on *Boston Harbor*, the Fifth Circuit set forth a two-part test to determine whether the city's actions constitute market regulation or market participation (the municipal-proprietor/market-participant doctrine): (1) does the challenged action reflect the city's own interest in the efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances; and (2) do the narrow scope of the actions defeat an inference that the primary goal was to encourage a general policy rather than a specific proprietary problem? *Cardinal Towing*, 180 F.3d at 693. Irrespective of whether the *Stucky* court reached the right conclusion, it cannot be said that the Fifth Circuit, after careful analysis, was without a factual basis to conclude that the City's actions, the classification of all collision tows as nonconsent, were not typical of private parties in similar circumstances, and did not defeat an inference that the City's primary goal was to encourage a general policy, that of prohibiting wreck chasing.[3] Petitioners argue the Fifth Circuit

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[3] There was ample evidence that the City's primary goal for establishment of the single vendor contract system was that of public safety; "Affidavits from the Chief of Police, the Police Captain in charge of vehicle storage, and the Deputy Chief of Police of the Support Services Division, in charge of overseeing the Vehicle Storage Unit, all support the understanding that the

incorrectly focused on the factual definitional distinction between consent and nonconsent in determining whether the disabled vehicle operator or the city was the consumer of the towing service at the scene of a vehicle collision for purposes of application of the municipal-proprietor/market-participant doctrine.[4] However, this factual distinction is critical because it defines who the market actors are.[5] As the *Stucky* court stated:

> "[I]n the consent tow situation, unlike the nonconsent tow situation, there are two competing market actors attempting to purchase services.

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reason the City chose to regulate towing and selected a single-vendor system was to improve public safety. In both the City's and Texas Towing's briefs and at oral argument, the parties agreed that safety was the primary consideration behind the passage and continued enforcement of the Ordinances." *Stucky*, 260 F.3d at 438 (footnotes omitted).

[4] Petitioners contented that City's actions are akin to any other private property owner contracting to have vehicles towed from the property owner's land. To accept this comparison is to accept the ridiculous conclusion the only time a vehicle owner can select a towing service of his choosing is if the vehicle happens to be involved in a collision on the vehicles owner's own property. Under petitioners' theory a private property owner has the unfettered right to select the towing service and the terms the disabled vehicle owner must accept, despite the fact the vehicle owner is standing there, ready, willing, and able to have the vehicle towed.

[5] The *Stucky* court recognized that this consent-nonconsent market distinction was critical to the court's holding in *Cardinal Towing*. Noting that had the distinction not been critical "the (*Cardinal Towing*) court simply could have stated that all City tows purchased by the City on public property were proprietary and, thus, exempt from § 14501(c)(1) preemption" *Stucky*, 260 F.3d at 436.

Each market actor may wish to obtain towing services "in keeping with the ordinary behavior of private parties." *Cardinal Towing*, 180 F.3d at 693. The challenged Ordinances, however, frustrate the normal working of private decision making in a market. Under the Ordinances, if a private party wishes to employ the services of Towing Company "A" and the City wishes to employ the services of Towing Company "B", the City's choice controls. This is so, not because the City needs to purchase the service for its own proprietary interest (i.e., "to serve the government's own [towing] needs"), but for the related safety interests of "society as a whole" (i.e., controlling public streets and easing traffic congestion). *See id.* at 691. Thus, if we are to compare the City's actions to the "typical behavior of private parties," as *Cardinal Towing* instructs us to do, the conflict is readily apparent. In the consent tow situation, by countermanding a private party's choice of towing company, the City is acting at cross purposes with the private party's market decision.

Furthermore, the City's market power cannot be said to be typical of similar private actors. In utilizing its police power to control a significant portion of the towing industry, the City's actions have the direct economic effect of contracting the market. This effect does not speak to a private proprietary purchase, but rather to a public regulatory plan. *See Tocher*, 219 F.3d at 1049 ("In analyzing the [municipal-proprietor] exception, it is vital to examine the substance of the transaction because a city may not use the guise of privity of contract to conduct

otherwise forbidden regulatory activity." (citations and internal quotations omitted))." *Stucky*, 260 F.3d at 436.

Petitioners cannot defeat the fact that at its core the City's single vendor contract system, as applied to consensual towing at the scene of a collision, regulates what towing services Respondents may engage in and prohibits disabled vehicle operators from entering the marketplace for towing services. *See, Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805 (1976) (This Court, discussing the market-participant doctrine, noted that State actions, through prohibition and burdensome regulation, interfere with the natural function of markets.). As the Fifth Circuit recognized, "it is only through its police power to regulate the City is able to classify all accident tows as nonconsensual, thus empowering itself with the authority to direct which towing service will perform the tow." *Stucky*, 260 F.3d at 435.

B. There Is No Conflict Amongst The Circuit Courts Regarding The Definition Of Consent And Nonconsent Towing Which Warrants Review By This Court.

The only circuit court to be presented with and specifically address the issue of the factual definitional distinction between consent and nonconsent towing as applied to towing from the scene of a collision has been the Fifth Circuit.[6] The consent-nonconsent factual distinction of

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[6] The *Mayer, Tocher,* and *Petrey* cases all involved challenges under 49 U.S.C. § 14501(c)(1) to municipal laws requiring tow truck operators and their trucks to be licensed or

collision towing reached by the Fifth Circuit in *Stucky*, is a practicable and logical interpretation of the terms, based upon the court's prior decision in *Cardinal Towing*. While the Fifth Circuit's definition of consent towing in *Stucky* may be more expansive, it does not conflict with the definition offered by its sister circuit courts. The Fifth Circuit merely defined the boundaries of the term at the scene of a collision.

In *Cardinal Towing*, the court, defining a nonconsent tow, stated a "true non-consent" tow occurs when "the owner of the vehicle is unwilling or unable to specify a towing company." *Cardinal Towing*, 180 F.3d at 694. "[N]onconsensual tows do not involve any opportunity for market interaction on the part of the owner of the vehicle." *Id.* at 696. "Because the owner of the vehicle will by necessity be unable to choose a towing company in non-consent situations, the only party that can make the type of merit selection inherent in market transactions is the party ordering the tow." *Id.* at 695. Logically, the Fifth Circuit in *Stucky* reached the conclusion that a consent tow occurs when the owner of the vehicle is willing or able to specify a towing company.[7] By implication,

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registered with the city regardless of the type of towing services performed. While the *Tocher* and *Petrey* courts found that nonconsensual towing services performed for the city were exempted from preemption, pursuant to the municipal-proprietor/market-participant doctrine, the courts did not address towing from the scene of a collision.

[7] The City of San Antonio recognizes the right of a vehicle owner to "consent" to having his vehicle towed when a vehicle on a public street is in need of towing for reasons other than a collision. San Antonio City Code, § 19-391(c): Other motor

because the disabled vehicle operator is present, there is opportunity for market interaction between the vehicle owner and tow truck operator for the contracting of towing services. *Stucky*, 260 F.3d at 436. As the *Cardinal Towing* court noted, City of Bedford's ordinance did not "affect situations in which the owner of a disabled car was available and expressed a preference for a particular company at the scene of the accident." *Cardinal Towing*, 180 F.3d at 689. The underlying principles in both *Stucky* and *Cardinal Towing* is that in a consent towing situation, because of the presence of the vehicle operator, the contractual relationship is between the disabled vehicle operator and the towing service. Conversely, in a nonconsent towing situation, because of the absence of the vehicle operator, the contractual relationship is between the city and the towing service.

Petitioners' contention that the City of Bedford's towing system (*Cardinal Towing*) affected "consent tow" as defined in *Stucky*, because by code, the city prohibits tow truck companies from soliciting at a collision scene, is suspect at best. The *Cardinal Towing* decision offers no indication that there was any preemption challenge to that section of the City of Bedford's City Code. Secondly, unlike the City of San Antonio's single vendor contract system, as stated above, the City of Bedford system allows vehicle operators to express a preference for a

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vehicles on public streets, ways or public property may be removed only with the express consent of the owner or operator, or at the direction of the chief of police, his designated representative, or the parking manager of the public works department and duly authorized representatives.

particular company at the scene of the accident, *i.e.*, enter the marketplace for towing services. *Id.* At best, Bedford's prohibition of solicitation affects the means of providing consensual towing services, not the definition.

The Fifth Circuit's definition of consent towing comports with the Eleventh Circuit's definition in *Mayer*, recognizing that consent tows are contractual. Consent tows "occur when the owner of the vehicle expressly requests towing services to be provided by a specific company and enters into a private contract with the towing company for services." *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 541 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). While the *Mayer* holding is pre-*Stucky*, the example of a nonconsent tow offered by the Eleventh Circuit, the towing of an abandoned vehicle impounded by the police, is in keeping with the underlying principles of the Fifth Circuit's understanding of the term. *Id.* at 541 n.2.

The Sixth Circuit in *Petrey* simply defined all police-ordered tows as nonconsensual, but offered no specific definition or explanation of the term. *Petrey*, 246 F.3d at 558. However, the court does state that in a consent tow situation, tow truck operators are not doing work for the police department. *Id.* at 559. While in *Tocher*, the Tenth Circuit's definition of nonconsensual towing includes disabled vehicles, along with abandoned and impounded vehicles, the definition was offered in the context of the types of towing the police employ the towing rotation list. *Tocher*, 219 F.3d at 1049. Like in *Petrey*, the *Tocher* court noted that the rotation list solely effects the relationship between the city and towing companies on rotation. *Id.* The *Tocher* decision offers no discussion as to

whether all disabled vehicles are classified as nonconsensual or if only those companies on rotation are permitted to tow disabled vehicles.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

JONATHAN E. BRUCE
Counsel of Record
LIVINGSTON & ASSOCIATES P.C.
6464 Savoy, Suite 100
Houston, Texas 77036
(713) 667-2234